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FCC Should Rely on Pro-Deployment Actions to Avoid Digital Discrimination

by

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Pursuant to congressional direction, the Federal Communications Commission is expected shortly to propose rules to facilitate equal access to broadband Internet services and to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." On November 7, the Communications Equity and Diversity Council (CEDC), a federal advisory committee, adopted a report on best practices to prevent digital discrimination. Significantly, the CEDC declined to define digital discrimination or urge disparate impact liability if broadband deployment unintentionally results in different outcomes among protected classes of people. This determination is consistent with the view expressed in our recent [Perspectives from FSF Scholars](#) that, pursuant to the Infrastructure Investment and Jobs Act of 2021, the FCC lacks the legal authority to adopt rules that impose liability based on a disparate impact test.

Like the CEDC, the FCC should decline to include disparate impact liability in any model policies, best practices, or rules that it develops. Instead, the Commission should focus proactively on ways for state and local governments, ISPs, and local communities to identify unserved or underserved areas and help get them connected. And the Commission should recommend that states and local governments accelerate deployment, including by reducing

permit approval time lags as well as by eliminating any other procedural impediments to constructing broadband infrastructure.

Section 60506(d) of the Infrastructure Investment and Jobs Act of 2021 requires the FCC to "develop model policies and best practices that can be adopted by the States and local governments to ensure that broadband internet access service providers do not engage in digital discrimination." The Commission chartered CEDC in June 2021, authorizing it to provide recommendations that will inform the agency's model policies and best practices.

A key takeaway from CEDC's report is that any remaining concern regarding unserved or underserved Americans is *not* an intentional discrimination problem. CEDC's report was based on a set of findings based on interviews it conducted, not on other hard data. One such finding is that there is a persistent digital divide in America concerning access to affordable, reliable, high-speed broadband services. Another finding is that "[t]he digital divide disproportionately affects communities of color, lower-income areas, and rural areas." However, this apparent divide does not appear to have been directly caused by discriminatory motives, as CEDC's report included *no* findings or evidence of any intentional discrimination by broadband ISPs in deploying infrastructure and offering broadband services.

Notably, CEDC's report did *not* include any recommendation regarding whether states or local governments should hold ISPs legally liable for broadband deployment decisions that unintentionally may result in disparate outcomes for protected groups. According to CEDC's report, "[t]he Committee did not define digital discrimination or digital redlining." Instead, the report cited various views about the meaning of digital discrimination that were expressed by different people who CEDC interviewed. Apparently, one or more interviewees regarded intent as an essential element of digital discrimination. And one or more interviewees disagreed, believing that a disparate impact on broadband access for legally protected groups constitutes digital discrimination even if such an outcome was entirely unintentional. The report concluded that "[i]ntent for digital discrimination should be further examined" by CEDC, the FCC, and stakeholders.

Indeed, the FCC should *not* make disparate impact liability part of its model policies or best practices for states and local governments. Although Commissioners, CEDC members, or stakeholders certainly are entitled to express their opinions, which may be helpful in identifying particular areas of concern, it is the direction of Congress as set forth in the law that must define "digital discrimination." According to the text of the Infrastructure Act – and especially when the text is read in conjunction with relevant judicial precedents – it must be concluded that intent is a necessary element of digital discrimination.

We set forth the statutory and jurisprudential basis for an intent-based standard for "digital discrimination" in our October 2022 *Perspectives from FSF Scholars: ["The FCC Should Reject a Disparate Impact Standard: Targeted Subsidies Should Be Used to Address Deployment Gaps."](#)*

Section 60506(b) requires the Commission to adopt new agency rules to facilitate equal access to broadband Internet services and to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." The requirement that the Commission

adopt rules prohibiting digital discrimination "based on" protected group status as well as the absence of statutory catchall terms such as "results in" or "otherwise adversely affects" show that intent is a required element of a finding of digital discrimination. This reading of the law is consistent with Supreme Court precedents. In *Smith v. City of Jackson* (2005) and *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015), the court found that similar statutory catchall terms provided the basis for applying a disparate impact standard, or at least were sufficiently ambiguous to provide a basis for deferring to agency interpretations of those particular statutes. But, again, unlike the statutes at issue in those cases, the Infrastructure Act contains no such catchall terms. Additionally, an intent-based standard is consistent with the Infrastructure Act's requirement that the Commission's rules prohibiting digital discrimination account for "issues of technical and economic feasibility" of deployments to geographic areas.

To its credit, CEDC appears to have fulfilled its primary task by making some sensible recommendations for model policies and best practices for states and local governments to prevent digital discrimination in broadband deployment and access. One of its recommendations is that state and local leaders – with cooperation from ISPs and community members – periodically assess where reliable high-speed broadband service is available. As the report explained, the goal of periodic assessments would be "to help identify unserved, underserved, and served areas and effectively direct funds and infrastructure towards areas that need the most support for the deployment of broadband services." Similarly, the report recommended that regular meetings be held by and among ISPs with stakeholders such as community leaders, labor organizations, and faith-based organizations to identify unserved and underserved areas and households as well as to develop solutions to overcome barriers to broadband access.

Additionally, CEDC's report recommended that states and local governments ensure non-discrimination and promote broadband deployment through the exercise of their powers in managing public property, including public rights-of-way. As the report acknowledged, "[b]roadband providers and community partners can face several delays and obstacles along the deployment journey," including difficulties in acquiring access right for infrastructure. The most helpful way that states and local governments can exercise those powers is by acting on CEDC's recommendation that "[s]tates and localities should take the necessary actions to remove these regulatory barriers to accelerate and encourage continued investment in broadband infrastructure deployment."

Over several years, numerous publications by Free State Foundation scholars have documented that local permit approval processes and related regulations have inhibited deployments by driving up costs of deploying broadband facilities and delaying their construction. Although the FCC has adopted reforms that are helpful in removing regulatory obstacles and streamlining permit approvals for new and upgraded infrastructure, states have broad authority to shorten permit processing timelines and reduce permitting fees. More timely and less expensive permitting processes will help ensure that the billions of dollars allocated to connect unserved and underserved Americans under the Infrastructure Act will be effective in closing any remaining digital divides.

In sum, CEDC's report could be helpful to the FCC as it carries out its required task under Section 60506(d) of the Infrastructure Act to develop model policies and best practices for states and local governments to prevent digital discrimination. Like the CEDC, the Commission should decline to insert disparate impact liability into the model policies and best practices that it is developing for states and local governments. The Commission should focus on proactive ways for state and local governments, ISPs, civil society organizations, and local communities to cooperatively identify unserved or underserved areas or households and help direct targeted efforts to get them connected. And the Commission should recommend that states and local governments exercise the authority they have over public property and rights-of-way to accelerate deployment, including by eliminating permit approval delays and other impediments to constructing broadband infrastructure.

Finally, CEDC's report also should be instructive for the Commission as it prepares to adopt federal rules to address digital discrimination. Section 60506(b) of the Act requires the Commission to adopt rules to facilitate equal access to broadband Internet services and to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." The Commission issued a Notice of Inquiry in March of this year that sought comment on what those rules ought to look like. The agency's proceeding has yielded zero evidence of intentional discrimination by ISPs on account of income, race, or ethnicity. As we explained in our *Perspectives*, the Commission's rules should be directed at preventing intentional discrimination – including by any facially neutral criteria shown to be a cover for invidious discrimination – while addressing any actual instances of disparate impact by targeting the areas of concern with subsidies to ensure broadband deployment and equal access for all.

Congress's intent must control the definition of digital discrimination. But the fact that CEDC's report declined to recommend that the definition include disparate impact should further support rejection of disparate impact liability in its forthcoming rules.

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Further Readings

Randolph J. May and Seth L. Cooper, "[The FCC Should Reject a Disparate Impact Standard: Targeted Subsidies Should Be Used to Address Deployment Gaps](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 51 (October 14, 2022).

Michelle Connolly, "[NTIA's BEAD Program Needs Revisions to Succeed](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 50 (October 3, 2022).

Seth L. Cooper and Andrew K. Magloughlin, "[The FCC Should Preserve and Expand Its Broadband Infrastructure](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 30 (June 8, 2022).

Andrew Long, "[Future Guidance Can Fix NTIA's Flawed 'Fiber-First' Approach](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 27 (May 24, 2022).

Seth L. Cooper, "[Fixed Wireless Access Is Boosting Rural Broadband and Consumer Choice](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 21 (April 25, 2022).

Andrew Long, "[Overlapping Broadband Appropriations Demand Agency Coordination: New FCC Maps Can Track Grants, Avert Waste](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 12 (March 2, 2022).

[Comments of the Free State Foundation](#), *In the Matter of Infrastructure Investment and Jobs Act Implementation*, NTIA Docket No. 220105-0002 (February 3, 2022).